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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

DAIRY, LLC, a Delaware Limited Liability Company,

Plaintiff,

vs.

MILK MOOVEMENT, INC., a/k/a/ Milk Moovement, LLC, a foreign Corporation,

Defendant.

Case No. 2:21-cv-02233-WBS-AC

The Honorable William B. Shubb

DEFENDANT MILK MOOVEMENT, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS THE COMPLAINT AND STRIKE ALLEGATIONS

Date: February 22, 2022
Time: 1:30 PM

NOTICE OF MOTION

PLEASE TAKE NOTICE that on February 22, 2022, at 1:30 p.m., or as soon thereafter as counsel may be heard in Courtroom 5, 14th Floor of the above-entitled court, located at 501 I Street, Sacramento, CA 95814, before the Honorable William B. Shubb, Defendant Milk Moovement, Inc. ("MMI" or "Defendant") will and hereby does move to (1) dismiss Plaintiff's Complaint ("Complaint") pursuant to Federal Rule of Civil Procedure ("Rule") 12(b)(6), and (2) strike certain portions of the Complaint pursuant to Rule 12(f), based upon the pleadings, this Notice, the attached Memorandum of Points and Authorities, Declaration of Benjamin Hand, the proposed order, and upon such further oral and written argument as may be presented at or before the hearing on this matter.

MOTION AND RELIEF REQUESTED

Pursuant to Rule 12(b)(6) and Rule 12(f), MMI hereby moves to strike the litigation hold notice from the Complaint and to dismiss Counts I and II of the Complaint with prejudice.

Dated: January 18, 2022

MORGAN, LEWIS & BOCKIUS LLP

By _____
CARLA B. OAKLEY

Attorneys for Defendant
Milk Moovement, Inc.

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I. INTRODUCTION

Plaintiff Dairy, LLC ("Dairy") brought this case to disrupt and prevent the transition of a dissatisfied customer — California Dairies Inc. ("CDI") — to Defendant Milk Moovement, Inc. ("MMI"). Dairy seeks to tramp down a competitor offering a software platform used in the dairy industry supply chain. Dairy strains to assert two identical trade secret misappropriation claims against MMI based on vague and conclusory allegations regarding industry standard reports that CDI generated using the Dairy software platform, modified to meet its individual needs, and provided to MMI. Dairy's allegations are contradicted by the documents incorporated by reference in the Complaint (including the so-called trade secret reports) and by Dairy's own allegations and admissions. The Complaint is fatally deficient in two key respects.

First, Dairy fails to identify a protectable trade secret. The alleged trade secrets are only identified as some unspecified reports generated using Dairy's software platform. But the Complaint and documents this Court may consider on a motion to dismiss establish that (i) the reports are not marked as "Trade Secret" or even as "Confidential," and there are no facts alleged to establish adequate measures to maintain secrecy; (ii) at least some of the reports are provided, with Dairy's knowledge, to third parties with no secrecy obligations; and (iii) the reports are comprised of information that is readily ascertainable, as they reflect CDI's data, government pricing data, and other industry standard information. The alleged trade secrets also

are not identified with sufficient particularity for MMI or this Court to know exactly what is or is not at issue.

Second, Dairy fails to allege facts to establish that MMI misappropriated its alleged trade secrets. Dairy does not and cannot plead any facts showing that (i) MMI knew or should have known that the reports contained any Dairy trade secret information; (ii) MMI knew or should have known CDI was contractually obligated to maintain the secrecy of any or all of those reports; or (iii) MMI ever used any of the alleged trade secret information.

Dairy's trade secret claims warrant dismissal with prejudice, as Dairy's allegations and the documents incorporated by reference in the Complaint demonstrate the futility of any amendment. Recognizing the fatal flaws in its claims, Dairy is seeking expedited discovery to try to find a new theory of relief and to further disrupt MMI's business.

The Complaint also devotes an entire section of to a "Litigation Hold Notice," which is irrelevant to either trade secret misappropriation claim and should be stricken.

II. BACKGROUND

A. Dairy's Conclusory Allegations of Trade Secret Misappropriation

The Complaint alleges two parallel claims for relief: trade secret misappropriation under federal law and trade secret misappropriation under state law.

Dairy alleges that it is a provider of "technology, service, and intelligence platforms to the dairy industry." Compl. ¶ 11.

Dairy further alleges that its "proprietary software platform generates proprietary and confidential reports that are quite revealing as to the nature, functionality, scope and performance of Dairy.com's proprietary software." Compl. ¶ 13. Dairy alleges that when MMI received "these reports," MMI "received a significant amount of Dairy's proprietary information, which MMI should in no way have any access." *Id.*

The alleged trade secrets at issue in this case are identified in paragraph 16 of the Complaint. Dairy alleges that it provides its customer, CDI, with "proprietary reports, developed over the course of twenty years, *including the following*: (1) Balancing reports; (2) Production Pooling reports; (3) Payroll reports; (4) Quality management reports; (5) List producers reports; and (6) Membership reports (collectively, the 'Trade Secrets'). *Id.* ¶ 16 (emphasis added).

For three of these six categories of reports, Dairy alleges that the reports "include many confidential, proprietary reports, constituting trade secrets, *such as the following*," and then lists two or three specific reports. *Id.* ¶¶ 17-19 (emphasis added).

Dairy admits that the reports include the kinds of information one would expect to track the volume of milk picked up from a farm and delivered to a milk product manufacturer, the milk products delivered to retailers, and to pay parties involved in the process. For example, the reports show milk volume, amounts of the components of the milk (*e.g.*, butter fat, milk solids, etc.), producer totals, and "typical hauling metrics."

Compl. ¶ 17.

While Dairy purports to identify steps it takes to protect the alleged trade secrets (*id.* ¶¶ 21-23), none of these have anything to do with MMI. For example, Dairy alleges that it requires the use of customized logins and unique passwords, routes new user set-ups through its customer support team, conducts yearly penetration tests, enforces Terms of Service and a Privacy Policy with its customers, and ensures that its employees satisfy various requirements. *Id.* 21. Dairy alleges that its customer CDI executed an agreement that somehow protects the alleged Trade Secrets (*id.* ¶ 22), but does not attach the agreement itself to the Complaint. Dairy does not allege and cannot allege that MMI ever had access to the alleged agreement or was aware of its alleged confidentiality terms before Dairy filed this lawsuit.

Dairy alleges that "an officer of MMI" on September 23, 2021, requested that CDI provide "over 20 reports from Dairy's supply chain software" and that unidentified CDI personnel in California sent by email "many of the requested reports to MMI" on September 27, 2021. *Id.* ¶ 26. Dairy further alleges, on information and belief, that the remaining requested reports were sent in October 2021. Without providing any facts, Dairy further alleges – again on information and belief – that MMI somehow should have known that Dairy considered reports, which are populated solely with CDI's data and government pricing data and are not marked as confidential, to be Dairy trade secrets, including unspecified reports that Dairy admits are routinely

provided to third parties. Compl. ¶ 26-27; Dkt. No. 8-2 at ¶ 8 (Declaration of Dairy Chief Operating Officer Duane Banderob, stating that "some of these reports are not always kept in CDI's sole possession, as they are sometimes shared with CDI's customers").

Dairy admits that it was aware that CDI would be transitioning to MMI's software platform in December 2021, "with the goal of full implementation and roll-out in January 2022." *Id.* ¶ 31. It would, of course, be absurd for CDI to have engaged MMI to fully replace Dairy's software platform in a few months if MMI did not already have a fully functioning platform that met CDI's needs well before receiving the reports at issue in this case on September 27, 2021, and sometime in October 2021.

B. Documents Incorporated by Reference in the Complaint

The following table identifies the documents incorporated by reference in the Complaint:

Ex. #	Document	Reference by Compl. ¶
1	California Federal Order and Quota Program	Compl., ¶ 19
2	Dairy's Terms of Use	Compl., ¶ 21
3	Dairy's Privacy Policy	Compl., ¶ 21
4	Sept. 23, 2021 Email from MMI to CDI	Compl., ¶ 26
5	Sept. 27, 2021 Email from CDI to MMI	Compl., ¶ 26
6	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Intransit Pounds"	Compl., ¶ 26

7	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Loads by Plant"	Compl., ¶ 26
8	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Pickups for Date Range" (PDF)	Compl., ¶ 26
9	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Pickups for Date Range" (xlsx)	Compl., ¶ 26
10	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Producer Weights and Tests (Pickup Date)"	Compl., ¶ 26
11	Attachment to Sept. 27, 2021 Email titled "Balancing_Reports – Scale vs Manifest"	Compl., ¶ 26

C. Procedural History

On December 2, 2021, Dairy filed its Complaint alleging two counts of trade secret misappropriation against MMI — one count of trade secret misappropriation under the Defend Trade Secret Act of 2016 ("DTSA"), and another count of trade secret misappropriation under the California Uniform Trade Secrets Act ("CUTSA"). On Friday, December 10, 2021, Dairy filed an *Ex Parte* Application for Temporary Restraining Order ("TRO") (Dkt. No. 8), and purported to serve MMI by email late that afternoon (nearly 8 p.m. local time for MMI, which is based in Nova Scotia, Canada). MMI filed its opposition to the TRO on Tuesday, December 14, 2021 (Dkt. No. 15). This Court denied the TRO on December 15, 2021,

stating that Dairy had not demonstrated that it had taken "reasonable measures" to keep the allegedly trade secret reports a secret. TRO Order, Dkt. No. 17. Dairy provided "no facts detailing how, if at all, plaintiff instructed California Dairies, Inc. to keep this information confidential or that the reports were at the least labeled confidential." TRO Order at 3. This Court also ruled that Dairy had failed to show "specific facts demonstrating that immediate and irreparable injury will result before the court could hear a motion for preliminary injunction." TRO Order at 5.

Pursuant to this Court's Order denying the TRO, the parties negotiated a regular briefing schedule for Dairy's preliminary injunction motion, with the opening brief due January 18, 2022, and a hearing on February 22, 2022. Dkt. No. 24. The parties also stipulated to an extension of the time for MMI to respond to the Complaint, and agreed that if MMI filed a motion to dismiss, it could be briefed and heard on the same agreed upon schedule as the preliminary injunction motion. *Id.* The Court approved the stipulated schedule on January 3, 2022. Dkt. No. 25.

D. Dairy Improperly Seeks Expedited Discovery to Fish for Evidence of Potential Claims

Notwithstanding the negotiated and court-approved schedule, and fully aware of MMI's plan to file a motion to dismiss, Dairy advised MMI on Friday, January 14, 2022, that it now plans to file a motion requesting expedited discovery, supposedly because it now thinks discovery would be helpful to the Court in addressing its motion for preliminary injunction. This is a

brazen attempt to circumvent the pleading obligations imposed by Rule 8 and to avoid the resulting consequences under Rule 12(b)(6). Dairy should not need and is not entitled to any discovery from MMI to adequately plead a trade secret claim. "A true trade secret plaintiff ought to be able to identify, up front, and with specificity the particulars of the trade secrets without any discovery." *Jobscience, Inc. v. CVPartners, Inc.*, 2014 U.S. Dist. LEXIS 26371, at *14-15 (N.D. Cal. February 28, 2014). Taken together, Dairy's inability to describe the subject matter of its trade secrets with sufficient particularity and its eleventh-hour request for expedited discovery evidences an intent to play the "old trick of vague pleading with the blanks to be artfully filled in only after discovery." *Id.*

III. THE TRADE SECRET CLAIMS SHOULD BE DISMISSED WITH PREJUDICE

To state a valid trade secret misappropriation claim under either the DTSA or CUTSA, a "plaintiff must allege that (1) the plaintiff owned a trade secret, (2) the defendant acquired, disclosed, or used the plaintiff's trade secret through improper means, and (3) the defendant's actions damaged the plaintiff." *E. & J. Gallo Winery v. Instituut Voor Landbouw-En Visserijonderzoek*, 2018 WL 2463869, at *3 (E.D. Cal. June 1, 2018); *Alta Devices, Inc. v. LG Elec., Inc.*, 343 F. Supp. 3d 868, 877 (N.D. Cal. 2018) ("The elements of misappropriation under the DTSA are similar to those under the CUTSA."). To be a trade secret, (1) the information cannot be "readily ascertainable through proper means," (2) the information must derive "independent economic value," and (3) the plaintiff must take

"reasonable measures to keep such information a secret." *Cherokee Chem. Co., Inc. v. Frazier*, 2020 WL 8410432, at *3 (C.D. Cal. Dec. 14, 2020).

Dairy's trade secret claims warrant dismissal for two separate and independent reasons. *First*, Dairy failed to identify protectable trade secrets as the subject matter is readily ascertainable and not secret, and also failed to identify the alleged trade secrets with sufficient particularity. *Second*, Dairy failed to plead any facts show a plausible act of misappropriation by MMI.

A. Legal Standard Governing 12(b)(6) Motions

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The Complaint must show "more than a sheer possibility that a defendant has acted unlawfully." *Id.* "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented and does not authorize a pleader's bare averment that he wants relief and is entitled to relief." *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 555 n.3 (2007). "A pleading that offers 'labels and conclusions' and formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of

'further factual enhancement.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557).

"Though a court generally is obligated to regard the well-pleaded facts of a complaint as true when deciding a Rule 12(b)(6) motion, that principle gives way when the allegations contradict documents attached to the complaint or incorporated by reference." *Groves v. Kaiser Found. Health Plan, Inc.*, 32 F. Supp. 3d 1074, 1079-80 n.4 (N.D. Cal. 2014); *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003) (documents incorporated by reference are considered "part of the complaint, and thus may assume that its content are true for purposes of a motion to dismiss under Rule 12(b)(6)."). For this reason, the Court "need not accept as true allegations contradicting documents made in a pleading or motion, including concessions made in plaintiff's response to the motion to dismiss as well as in response to any other pleading or motion." *Johnson v. Fed. Home Loan Mortg. Corp.*, 793 F.3d 1005, 1007-08 (9th Cir. 2015).

B. The Complaint Does Not Adequately Describe Any Protectable Trade Secrets

Dairy fails to allege the most fundamental element of its trade secret claims – a protectable trade secret. Although "a plaintiff need not 'spell out the details of the trade secret" at the pleading stage, it must "describe the subject matter of the trade secret with sufficient particularity … to permit the defendant to ascertain at least the boundaries within which the secret lies." *Alta Devices, Inc. v. LG Elecs., Inc.*, 343 F. Supp. 3d 868, 881 (N.D. Cal. 2018) (quoting *Autodesk, Inc. v.*

ZWCAD Software Co., 2015 WL 2265479, at *5 (N.D. Cal. May 13, 2015)); *E. & J. Gallo*, 2018 WL 2463869, at *3 (same); *see also Farhang v. Indian Inst. of Tech.*, 2010 WL 2228936, at *13 (N.D. Cal. June 1, 2010) ("Before a defendant is compelled to respond to a complaint upon claimed misappropriation or misuse of a trade secret and to embark on discovery which may be both prolonged and expensive, the complainant should describe the subject matter of the trade secret with sufficient particularity").

Dairy fails to offer any details about the alleged trade secrets and fails to allege facts to establish it took reasonable measures to maintain their secrecy. Instead, Dairy merely alleges the trade secrets are part of the "proprietary reports" that "Dairy.com provides to CDI, developed over the course of twenty years, including the following: (1) Balancing reports, (2) Production Pooling reports, (3) Payroll reports, (4) Quality Management reports, (5) List Producers reports, and (6) Membership reports (collectively, the 'Trade Secrets')." Compl., ¶16. Neither this nor any other of Dairy's allegations identifies a trade secret that is not readily ascertainable, describes the subject matter of the trade secrets with the necessary particularity, or establishes reasonable measures to maintain secrecy.

First, Dairy's allegations fail to notify MMI of the "boundaries within which the trade secrets lie" because "the trade secrets are an unknown subset" of its undefined "proprietary reports." *Zoom Imaging Solutions, Inc. v. Roe*, 2019 WL 5862594, at *3-5 (E.D. Cal. Nov. 8, 2019); *Soil Retention*

Products, Inc. v. Brentwood Industries, Inc., 521 F.Supp.3d 929, 966 (S.D. Cal. 2021) (dismissing trade secrets misappropriation claims — "From the allegations pled, it is unclear whether Plaintiff's trade secret covers the product itself, its components, or just the manufacturing process.").

This Court's decision in *Zoom Imaging* is directly on point. Just as Dairy alleges it developed certain "proprietary reports" and that the purported trade secrets are part of these reports, the plaintiff in that case alleged that it had developed certain "Confidential Information" and that "the trade secrets at issue were part of this Confidential Information." *Id.* at *4 ("Plaintiff does not claim, however, that all of this Confidential Information constitutes trade secrets. Rather, plaintiff alleged that the trade secrets at issue were part of this Confidential Information."). And just as Dairy's allegations fail to distinguish between the "proprietary reports" and the "trade secrets," the plaintiff's allegations similarly "fail[ed] to distinguish between the Confidential Information and the trade secrets." *Id.* This Court dismissed the trade secret claims in *Zoom Imaging* "[b]ecause the list of Confidential Information is not exhaustive, and because the trade secrets are an unknown subset of the indefinite Confidential Information," recognizing that "plaintiff does not sufficiently identify anything." *Id.* at *5. Like the complaint in *Zoom Imaging*, here Dairy's "Complaint gives [MMI] no clue whatsoever about what information forms the basis of [Dairy's] misappropriation claim." *Id.*

Second, Dairy's allegations purportedly identifying the trade secrets are "vague and conclusory" because they "consist of a generic list of categories of various types of information." *BladeRoom Grp. Ltd. v. Facebook, Inc.*, 2015 WL 8028294, at *3 (N.D. Cal. Dec. 7, 2015) (emphasis added). Even if Dairy amended the Complaint to differentiate properly between the "proprietary reports" and purported "Trade Secrets," Dairy's trade secret claims would still fail because it identifies the "Trade Secrets" by listing six generic categories of reports — namely, (1) Balancing reports, (2) Production Pooling reports, (3) Payroll reports, (4) Quality Management reports, (5) List Producers reports, and (6) Membership reports. The law requires that Dairy do more than just plead "broad, categorical terms, [that are] more descriptive of the types of information that generally *may* qualify as protectable trade secrets than as any kind of listing of particular trade secrets." *Vendavo, Inc. v. Price f(x) AG*, No. 17-cv-06930-RS, 2018 U.S. Dist. LEXIS 48637, at *9 (N.D. Cal. Mar. 23, 2018). Dairy's allegations are akin to those that other courts have deemed too vague. *Bladeroom Grp. Ltd. v. Facebook, Inc.*, 2015 WL 8028294, at *9 (N.D. Cal. Dec. 7, 2015) (dismissing trade secret claims where the plaintiff identified the trade secrets as a "generic list of categories of various types of information"); *Space Data Corp. v. X*, 2017 WL 5013363, at *2 (N.D. Cal. Feb. 16, 2017) (same where the plaintiff described the trade secrets as "data on the environment in the stratosphere" and "data on the propagation of radio signals from stratospheric balloon-based transceivers").

It is of no consequence that Dairy's reports allegedly reveal "a tremendous amount of data" concerning "various operational challenges and federal regulations." Compl., ¶16. That is precisely the language that has been found insufficient. *Carl Zeiss Meditec, Inc. v. Topcon Medical Sys., Inc.* 2019 WL 11499334 (N.D. Cal. Nov. 13, 2019) (dismissing complaint that defined trade secrets as "various types of information" that is "(a) related to the development and commercialization of CZMI's ODx Products," and (b) "related to the sales and marketing-related aspects of CZMI's ODx Products."); *Farhang*, 2010 WL 2228936 at *3 (same where trade secrets described as "business models and implementations," including "specifics regarding the actual implementation of the global railways and Indian Railways project"). Dairy's vague descriptions fall well short of the reasonable particularity required to state a valid claim for trade secret misappropriation.

Third, Dairy's allegations fail to "describe the subject matter of the trade secret with sufficient particularity to separate it from matters of general knowledge in the trade or of special knowledge of those persons who are skilled in the trade." *Alta Devices*, 343 F. Supp. 3d at 881. Dairy likewise fails to allege facts sufficient to establish that the so-called trade secrets would not be ascertainable through proper means. *Cherokee Chem. Co.*, 2020 WL 8410432, at *3. This is particularly problematic here because the alleged trade secrets *admittedly* include generally-known and publicly-available information. For example, after identifying the "Production Pooling Reports" as

one category of the alleged "Trade Secrets," Dairy admits that those reports include information collected and provided to it by customers like CDI, such as "milk volume and component totals," while certain other information was collected and published by the U.S. Department of Agriculture, such as "federal order designation(s)." Compl. at ¶ 17. These concessions are consistent with Dairy's Privacy Policy and Terms of Use, which are incorporated by reference in the Complaint. *See* Compl., ¶ 21; Ex. 2 (Terms of Use) at § 1 (defining data collected and provided by client as "Farm Data"—"Farm Data shall mean information, data and other content, in any form or medium, that is collected, downloaded or otherwise received, directly or indirectly from you by or through the Software."); § 5 (agreeing that Dairy's customers retain ownership of the Farm Data—"We each agree that any Farm Data collected through the Software is owned by you."); *see also* Ex. 3 (Privacy Policy) (sets forth terms for providing any third-party access to the Farm Data). Dairy likewise admits that those reports include common measurements and calculations, including "typical hauling metrics" and "calculations related to the California federal order and quota program." *Id.* This too is confirmed by the referenced document. Ex. 1 (California Federal Order and Quota Program) at Article 10, §1003 ("Handlers shall deduct a fee from payments made to producers for all milk received or diverted each month in an amount calculated by multiplying the pounds of solids not fat handled for the producer by the quota revenue assessment rate.").

The same is true for the categories labelled as the "Payroll

Reports" and "Balancing Reports." Compl. at ¶¶ 18 and 19. Despite identifying both as "Trade Secrets," Dairy admits that the "Payroll Reports" include well-known *concepts*, such as "the concept of 'assignments' in U.S. payroll software" (Compl. at ¶ 18), and that the "Balancing Reports" include standard ways to *structure* data collected by customers like CDI, like the "data structure" used to report "Pickups for Date Range"—*i.e.*, organizing the pickups by date and reporting only those within the requested date range (Compl. at ¶ 19). Once again, the California Federal Order and Quota Program not only discloses — but ***mandates*** — both the specific assignments and the data structures for these reports. Ex. 1 (California Federal Order and Quota Program) at Article 8, §800 (identifying and organizing assignments by the county — *e.g.*, "A negative 27 cents (-$0.27) per hundredweight, (-$.031034) per pound of quota solids not fat, is assigned to dairy farms located within the counties of: Fresno, Kings, and Tulare"); *id.* at Article 10, §1000 ("The report shall include the following: (a) The amount of milk, milk fat, and solids not fat received from the producer or diverted; (b) The amount of product paid for as quota solids not fat and the revenue; (c) The dollar value and applicable rate of quota assessment deducted from the producer; and (d) The rate and amount of Regional Quota Adjuster deducted from the producer.").

Dairy also admits that certain of the allegedly trade secret reports are routinely provided to third parties without any steps to maintain their secrecy (Dkt. No. 8-2 at ¶ 8), but does not identify which of the reports are freely provided or explain how

MMI would be able to discern which reports Dairy considers to be trade secrets and which can be freely provided to third parties. The reports themselves are not marked as "Trade Secret" or even as "Confidential" (Exs. 6-11) and there are no facts alleged establishing steps to maintain the secrecy of the reports *vis a vis* MMI. *See Cherokee Chem. Co.*, 2020 WL 8410432, *3 (plaintiff must take reasonable measures to maintain information as secret). Documents incorporated by reference in the Complaint belie Dairy's secrecy claims. Ex. 2 (Terms of Use) at § 1.2 (providing Dairy's customers with the right to authorize "any individual" to "access the Software via any web enabled device.").

Dairy acknowledges this tension in the Complaint but fails to plead any facts to reconcile it. Unable to allege that the entirety of each report is a trade secret, Dairy alleges that "many" unspecified portions of each report still constitute a trade secret. Compl. at ¶ 17 ("The Production Pooling Reports contain many confidential, proprietary reports, constituting trade secrets"), ¶ 18 (same for Payroll Reports), ¶ 19 (same for Balancing Reports). Dairy's failure to describe those portions with sufficient particularity is fatal to its claims. Indeed, courts routinely hold that a plaintiff pleading trade secrets that overlap with public information or general knowledge must do more to distinguish between that which is known versus that which is secret, or face dismissal. *Space Data*, 2017 U.S. Dist. LEXIS 22571, at *4-6 (dismissing trade secret claim where plaintiff had "not made clear which aspects of its technology and other information are 'part of patents and pending patent

applications,' if any, and which are secret.").

Dairy's failure to plead any protectable trade secret with sufficient particularity and failure to allege reasonable measures to maintain secrecy warrants dismissal of its trade secret claims.

C. The Complaint Does Not Adequately Plead Any Acts of Misappropriation

As a second, independent ground for dismissal, Dairy's trade secret claims fail adequately to plead misappropriation — *i.e.*, the improper acquisition, disclosure, or use of the alleged trade secret. *See* 18 U.S.C. § 1839(5)(A)-(B); Cal. Civ. Code § 3426.1(b)(1)-(2).

First, Dairy fails to plead misappropriation through improper acquisition. The Complaint states that both of "Dairy's trade secret misappropriation claims arise out of, or relate to, MMI's activities in California." Compl., ¶ 9. Yet the only alleged MMI conduct that concerns California involves an email exchange between an MMI "officer" in Canada and CDI representatives in California:

> On or around September 23, 2021, an officer of MMI in Canada sent an email to CDI representatives in California requesting that CDI provide it Dairy's Trade Secrets by providing MMI with over 20 reports from Dairy's supply chain software. …
>
> On or about September 27, 2021, CDI personnel in California sent by email many of the requested reports to MMI. On information and belief, the remaining reports were sent in October 2021.

Compl., ¶26. Dairy pleads only conclusory allegations, no *facts*

showing that MMI knew or had reason to know that the reports used by CDI were generated by Dairy. The two emails incorporated by reference in the Complaint — attached hereto as Ex. 4 (the Sept. 23, 2021 email) and Ex. 5 (the Sept. 27, 2021 email) — do not even mention Dairy, let alone show that MMI specifically requested "reports from Dairy's supply chain software." *Compare* Compl., ¶26 *with* Ex. 4 & 5. Nor does the Complaint plead any *facts* suggesting that MMI knew or had any reason to know that the requested reports contained confidential information, let alone trade secrets. Dairy admits at least some of the reports are provided to third parties, without obligations of secrecy. Dkt. No. 8-2 at ¶ 8. As this Court stated in denying the TRO (Dkt. No. 17), the reports themselves were not marked confidential (or as trade secrets), which is the most rudimentary tool used to maintain secrecy. TRO Order at 3; Exs. 6-11.

Worse yet, the three referenced emails contradict Dairy's bald allegations, including MMI's alleged motive for requesting the reports — namely, to reverse engineer the Dairy software responsible for generating the reports. Compl. ¶¶ 27-29; *Johnson*, 793 F.3d at 1007-08 ("The court need not accept as true allegations contradicting documents made in a pleading."). MMI's email made clear to CDI that the reports should include "any modifications that you make to them manually." Ex. 4 (emphasis added). The fact that MMI requested reports with CDI's custom modifications contradicts Dairy's allegations further supports MMI's lawful intentions in making the request. The email reflects that MMI only requested to see the reported information

in the manner specifically used by CDI to demonstrate that MMI's "reporting capabilities" could meet CDI's current reporting needs. *Id.* Dairy's failure to plead facts "tending to exclude" this "theory of innocent market entry" renders its allegations of misappropriation implausible. *See, e.g., Veronica Foods Co. v. Ecklin*, No. 16-CV-07223-JCS, 2017 WL 2806706, at *8 (N.D. Cal. June 29, 2017) (plaintiff must allege facts that are not "merely consistent with' both a theory of innocent market entry and the theory that Defendants used [Plaintiff's]confidential customer list, but rather 'tend[] to exclude' an innocent explanation."); *Eclectic Properties E., LLC v. Marcus & Millichap Co.*, 751 F.3d 990, 996-97 (9th Cir. 2014) ("[P]laintiffs cannot offer allegations that are merely consistent with their favored explanation but are also consistent with the alternative explanation. Something more is needed, such as facts tending to exclude the possibility that the alternative explanation is true, in order to render plaintiffs' allegations plausible").

There is and could be no allegation that MMI has ever had access to anything that would allow it to reverse engineer the software platform used to generate the reports at issue.[1] Even if that were the case (which it is not), reverse engineering is allowed under trade secret law. *See Chicago Lock Co. v. Fanberg*, 676 F.2d 400, 405 (9th Cir. 1982) (individual's reverse engineering of a lock he purchased "… is an example of the

[1] As a technical matter, it is well-known that it would not be feasible to reverse engineer Dairy's software code solely from the type of reports that CDI is alleged to have provided to MMI. The reports do not reveal algorithms, and do not provide a means to discern underlying code.

independent invention and reverse engineering expressly allowed by trade secret doctrine."). The DTSA explicitly states that reverse engineering is not an improper means of acquiring a trade secret. 18 U.S.C. § 1839(6)(B) ("the term improper means … does not include reverse engineering"). No contract can change the statutory definition of "improper means" to include reverse engineering. *See Aqua Connect, Inc. v. Code Rebel, LLC*, 2012 WL 469737, at *2-3 (C.D. Cal. Feb. 13, 2012) (dismissing trade secret misappropriation claim with prejudice because violating a user agreement may support a breach of contract claim, but "does not convert reverse engineering into an improper means" in California trade secret law); *DVD Copy Control Ass'n, Inc. v. Bunner*, 31 Cal. 4th 864, 901 n.5, (2003) (Moreno, J., concurring) ("federal patent law alone grants universal protection for a limited time against the right to reverse engineer").

Second, Dairy fails to sufficiently plead the knowledge requirement for an indirect trade secret misappropriation claim — namely, that MMI either "(a) knew or had reason to know before the use or disclosure that the information was a trade secret and knew or had reason to know that the disclosing party had acquired it through improper means or was breaching a duty of confidentiality by disclosing it; or (b) knew or had reason to know it was a trade secret and that the disclosure was a mistake. *MediStrem, Inc. v. Microsoft Corp.*, 869 F. Supp. 2d 1095, 1114 (N.D. Cal. 2012). Dairy alleges that, "on information and belief, MMI knew or had a reasonable expectation that CDI was not authorized to share Dairy's proprietary, confidential, Trade

Secrets with MMI." Compl., ¶27. Once again, Dairy fails to plead the necessary *facts* to support its naked allegation. *Navigation Holdings, LLC v. Molavi*, 445 F. Supp. 3d 69, 79-80 (N.D. Cal. 2020) (dismiss trade secret misappropriation claims – "Plaintiffs make a conclusory assertion that Defendants 'had reason to know that the confidential information and trade secrets were acquired under circumstances giving rise to the duty to maintain their secrecy or limit their use.' But this assertion is devoid of any factual substantiation of Defendants' knowledge.").

Despite alleging that "CDI signed an agreement with Dairy that included … specific language prohibiting CDI from providing Dairy's Trade Secrets to Competitors" (Compl., ¶22), Dairy never pleads any facts showing that MMI knew or had reason to know that CDI was contractually obligated to keep those reports confidential. MMI is neither alleged to have been a party to that agreement nor have been made aware of those contractual obligations by CDI or any other party to that agreement. *MediStrem, Inc. v. Microsoft Corp.*, 869 F.Supp.2d 1095, 1114 (N.D. Cal. 2012) (dismissing trade secret claims because the complaint "fails to include facts demonstrating that it knew or had reason to know that any information it allegedly acquired from [third party] was improperly acquired or disclosed" – "the FAC does not assert that at the time [defendant] allegedly began obtaining such technology from [third party], [defendant] had any knowledge that [plaintiff's contractual relationship with [third party] had soured, or that [third party] was not authorized to

supply VR technology similar to that developed by [plaintiff]"); *Cleanfish, LLC v. Dale Sims, et al*, 2020 WL 4732192, at *6-7 (N.D. Cal. Aug. 14, 2020) (dismissing trade secret claim where plaintiff's allegation that defendant "was never privy" to plaintiff's trade secret means that [defendant] would not plausibly have any reason to know that the customer list it received was supposedly stolen from plaintiff").

Dairy does not even allege that MMI became aware of CDI's contractual obligations once it obtained the purportedly "confidential information" in Dairy's reports. Nor could it. The reports themselves were never designated confidential. Exs. 6-11. Dairy cannot impose upon MMI the confidentiality obligations of another, especially when MMI could not reasonably have known that those obligations existed, let alone the scope of those obligations. *Convolve Inc. v. Compaq Computer Corp.*, 527 Fed. App'x 910, 924-25 (Fed. Cir. 2013) (no misappropriation where the alleged trade secrets were not designated by the plaintiff as confidential because, "consistent with general principles of California contract law" and "common sense," one cannot "circumvent its contractual obligations or impose new ones . . . via some implied duty of confidentiality."); *Navigation Holdings*, 445 F. Supp. 3d at 79-80 (dismissing trade secret claims—"Plaintiffs argue that '[Defendant] knew that Molavi owed duties to [Plaintiff],' and that [Defendant] hired Molavi, 'intending that [Molavi] would take and utilize Plaintiffs' trade secrets.' Yet Plaintiffs do not actually allege that [Defendant] itself actually used the trade secrets, and [Defendant's] alleged

conduct largely states other claims, such as breach of contract, not trade secret misappropriation.").

Dairy does not and cannot allege facts to establish the requisite level of knowledge, as courts regularly require. For example, in stark contrast to the allegations here, in *Genentech*, the plaintiff alleged that the defendant received a report "clearly labeled" with the plaintiff's name and "clearly marked 'Confidential' and 'Internal Only.'" *Genentech, Inc. v. JHL Biotech, Inc.*, 2019 WL 1045911, at *12 (N.D. Cal. Mar. 5, 2019). Similarly, in *Wang*, the plaintiff alleged that defendant had been told during a meeting that the information was the subject of a pending patent application, which the court noted was "usually confidential until published." *Wang v. Palo Alto Networks, Inc.*, No. C 12-05579 WHA, 2013 WL 415615, at *3 (N.D. Cal. Jan. 31, 2013).

Third, Dairy fails sufficiently to plead misappropriation by improper use. *Soil Retention*, 521 F. Supp. 3d at 960 ("Just as the *Pellerin* Court held that 'mere possession of trade secrets is not enough,' this Court likewise holds that Plaintiff's allegations fail to allege any non-conclusory facts that plausibly suggest Defendant used Plaintiff's alleged trade secret"). Aside from reciting the same conclusory allegation under each count of trade secret misappropriation — *i.e.*, "MMI has used Dairy.com's Trade Secrets without express or implied consent" (Compl., ¶¶ 41, 57) — the Complaint never alleges that MMI "used" the reports it received from CDI. Dairy fails to plead any facts showing that MMI incorporated into its reports

any of Dairy's purported trade secrets that it received from CDI. *Agency Solutions.Com, LLC*, 819 F.Supp.2d, 1029. ("[A] trade secret embodied in the product of a misappropriating party is 'used' if it is incorporated as such in the resulting product."). Nor does Dairy plead any facts (nor could it) showing that MMI employed any Dairy trade secret information from those reports to improve the software it uses to generate its own reports. *See id.* at 1030 (finding generalized knowledge of architecture being used in similar software by competing companies did not constitute "use" of trade secrets).

Dairy's failure to plead any act of misappropriation by MMI provides a separate and independent basis for dismissal of its trade secret claims.

D. Leave to Amend Would Be Futile.

Dairy's allegations of trade secret misappropriation are implausible on their face. The reports only contain information from CDI or the government, the reports themselves (which the Court can review for this motion as they are referenced in the Complaint) are industry standard and reveal the generic nature of the reports (such as listing the names of farms, volumes of milk, milk content data, hauling metrics, pricing, and who gets paid what) and the reports are not marked as trade secrets or even as confidential. *See, infra,* at Ex. 6-11. Moreover, Dairy's allegation the MMI obtained the reports to create a competitive platform defies logic as Dairy admits that MMI did not even receive the bulk of them until the eve of a transition to the MMI platform. Dairy therefore cannot allege any further facts to

adequately plead a trade secret misappropriation claim under either the DTSA or CUTSA.

Dairy already has filed two complaints, and still come up far short of a viable claim. It first filed a complaint against MMI alleging trade secret claims on November 29, 2021, in the Central District of California. Case No. 2:21-cv-09279. Dairy voluntarily dismissed that complaint and filed the Complaint at issue here on December 2, 2021. MMI advised Dairy of the pleading deficiencies and that it would be filing a motion to dismiss, but Dairy declined to amend its claims. Dairy has had sufficient time between the discovery of the alleged misappropriation and the filing of the Complaint at issue here to develop and plead the factual bases for its misappropriation claims, which it has not done. It likewise should not be allowed time to take expedited discovery under the guise of its preliminary injunction motion to try to craft a viable claim. *Jobscience, Inc. v. CVPartners, Inc.*, 2014 U.S. Dist. LEXIS 26371, at *14-15 (N.D. Cal. February 28, 2014).

For these reasons, both of Dairy's trade secret misappropriation claims should be dismissed with prejudice. *Aqua Connect*, 2012 WL 469737, at *2-3.

IV. THE HOLD NOTICE SHOULD BE STRICKEN FROM THE COMPLAINT

The Complaint contains a generic "Litigation Hold Notice" that purportedly "puts MMI on *notice* of [various] requirements for document collection and retention." The Court should strike the litigation hold notice because it is "immaterial" to the pleadings. Fed. R. Civ. P. 12(f).

Although motions to strike are "generally disfavored," they should be granted where, as here, "the matter to be stricken could have no possible bearing on the subject matter of the litigation." *Neveu v. City of Fresno*, 392 F.Supp.2d 1159, 1170 (E.D. Cal. 2005) (citation and quotation marks omitted). Striking the litigation hold notice would also remove "unnecessary clutter" from litigation. *Sun Life Assur. Co. of Canada v. Great Lakes Business Credit LLC*, 968 F. Supp. 2d 898, 902 (N.D. Ill. 2013); *Amini Innovation Corp. v. McFerran Home Furnishings, Inc*. 301 FRD 487, 490 (C.D. Cal. 2014) (striking references to allegations from a different complaint filed by the same plaintiff against the same defendant). The litigation hold notice is similarly immaterial and should be struck from the Complaint.

V. CONCLUSION

The Complaint and early tactics in this litigation confirm that Dairy filed this action to disrupt and prevent the transition of one of its dissatisfied customers to a competitor. Dairy has not alleged facts to establish the required elements of its trade secret claims, nor are such claims plausible. MMI respectfully requests that the Court dismiss Dairy's trade secret claims with prejudice and strike the litigation hold notice from the Complaint.

Dated: January 18, 2022

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